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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

CHRISTOPHER ADAMS, Plaintiff and Appellant, v. ROBERT MONDAVI WINERY WOODBRIDGE et al., Defendants and Respondents.	C055800 (Super. Ct. No. CV023309)

Plaintiff Christopher Adams filed a complaint against his former employer, defendants Robert Mondavi Winery Woodbridge and the Robert Mondavi Corporation, alleging he had been constructively discharged from his position as a cellar assistant supervisor. Of the five causes of action initially alleged in his complaint, only one, a claim for constructive discharge in violation of public policy, went to the jury, and that claim was resolved in favor of defendants.

Plaintiff's appeal is limited to the pretrial adjudication of two other claims. The trial court granted defendants' motion for summary adjudication on plaintiff's first cause of action

alleging violations of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Plaintiff asserts that this ruling was erroneous because triable issues of fact remained on several of his claims relating to disability discrimination.

The court also found that plaintiff did not exhaust his administrative remedies for claimed Labor Code violations and therefore granted defendants' motion for judgment on the pleadings on plaintiff's second cause of action alleging these statutory violations. Plaintiff challenges this ruling as well.

None of plaintiff's claims has merit, and we therefore affirm the judgment.

FACTS AND PROCEEDINGS

The undisputed facts and supporting evidence established the following:

Plaintiff worked for defendants as an assistant cellar supervisor at one of its wineries. He was responsible for directing other cellar workers in performing the manual labor involved in processing wine.

In March 2003, defendants conducted a respirator training and fit test for its cellar employees. Plaintiff asked for a Cal-OSHA medical evaluation questionnaire before agreeing to submit to this testing. One was not immediately available, and plaintiff walked out of the training.

The safety manager who had been conducting the training complained to plaintiff's supervisors that plaintiff's conduct was disruptive and set a poor example for the other employees.

Five days later, on March 12, 2003, defendants placed plaintiff on paid decision-making leave for the remaining half-day of his shift. This action became the focus of plaintiff's subsequent lawsuit. Defendants told plaintiff that this leave was "the final step of our discipline procedure. . . . We want you to spend the rest of your shift thinking through whether this is the right job for you and whether you can solve this problem and perform every part of your job at a fully acceptable level, or decide to quit and get a job that's better for you. . . . [¶] . . . Any future incidents resulting in disciplinary action will result in immediate termination. You are not eligible for a merit increase or bonus in September 2003."

Plaintiff wrote a memo challenging this suspension, and he asked to be transferred out of the cellar department to avoid exposure to hazardous chemicals. He also filed a complaint with the Department of Industrial Relations.

Several other incidents occurred when plaintiff returned to work. For example, plaintiff refused to operate some equipment or enter the building where the equipment was contained because he thought the building contained hazardous chemicals. Defendants ultimately put plaintiff on paid administrative leave for approximately one month while they "sorted through things."

During his leave, plaintiff saw defendants' company doctor for a medical evaluation. Plaintiff had previously mentioned to

his immediate supervisor that he "was getting winded, having problems breathing, coughing, and wheezing." On April 15, 2003, the doctor reported that plaintiff had unspecified "health issues that preclude his wearing a standard respirator at the present time." Plaintiff met with defendants the same day. In response to the doctor's report, defendants ordered a power respirator for plaintiff. Plaintiff raised other complaints, was sent home on paid leave, and told to return on April 21.

On April 22, back at work, plaintiff attended a training session on emergency procedures. He asked to copy documents outlining the chemical substances used at the winery. Defendant became very upset upon reading these reports and did not finish his shift. The next day, his psychiatrist sent defendants a letter to put plaintiff on medical leave.

On May 5, 2003, while on leave, plaintiff submitted his resignation, stating he was unable to accept "the intolerable working conditions of continuing exposure to hazardous chemicals, unsafe working conditions and retaliation for publishing my concerns."

In March 2004, plaintiff filed a lengthy complaint against defendants alleging discrimination and wrongful termination. Ultimately, plaintiff's case went to the jury on only one of his causes of actions, a claim for constructive discharge in violation of public policy. The jury returned a defense verdict.

This appeal involves two causes of action that were adjudicated in favor of defendants before trial. One cause of

action alleged violations of FEHA and the other charged violations of various Labor Code provisions. We discuss each in greater detail in the analysis that follows.

DISCUSSION

I

Summary Adjudication of FEHA Claims

A motion for summary adjudication "resolves a pure question of law [citation], namely whether there is any triable issue as to any material fact and, if not, whether the moving party is entitled to adjudication in his favor as matter of law [citation]." (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)

As this court succinctly outlined, "We construe the moving party's papers strictly and the opposing party's papers liberally. [Citation.] The moving party must demonstrate that under no hypothesis is there a material factual issue requiring a trial, whereupon the burden of persuasion shifts to the opposing party to show, by responsive statement and admissible evidence, that triable issues of fact exist. [Citations.]

"However, '[f]rom commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that [it] is entitled to judgment as a matter of law. . . . There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard

of proof.' [Citation.] On appeal, we exercise our independent judgment to determine whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law." (*Thousand Trails, Inc. v. California Reclamation Dist. No. 17* (2004) 124 Cal.App.4th 450, 457; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857.)

Under this de novo standard of review, the trial court's reasoning is irrelevant, and we will affirm on any ground supported by the record. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) Summary adjudication may be granted on grounds other than those tendered by a party if the relevant material fact is undisputed and entitles the moving party to judgment as a matter of law. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69-70.)

"For practical purposes, an issue of *material* fact is one which, in the context and circumstances of the case, 'warrants the time and cost of factfinding by trial.' [Citation.] In other words, not every issue of fact is worth submission to a jury. The purpose of summary [adjudication] is to separate those [causes of action] in which there are *material* issues of fact meriting a trial from those in which there are no such issues." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1375.)

"'The admissions of a party receive an unusual deference in summary [adjudication] proceedings. An admission is binding unless there is a credible explanation for the inconsistent

positions taken by a party. [Citations.]' [Citation.] 'When such an admission [against interest] becomes relevant to the determination . . . of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits.' [Citation.]" (*People ex rel. Dept. of Transportation v. Ad Way Signs, Inc.* (1993) 14 Cal.App.4th 187, 200.)

When discrimination cases are the subject of summary adjudication proceedings, "'the trial court will be called upon to decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing.'" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344 (*Arteaga*), italics omitted.) Thus, while the ultimate burden of proof remains with plaintiff to establish a discriminatory termination, the burdens are reversed in summary adjudication proceedings, with the burden resting on the moving party to negate the plaintiff's right to prevail on a particular issue. (*Ibid.*)

In order to establish a prima facie case of discrimination on the grounds of physical disability, a plaintiff must

demonstrate that "'"(1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability."'" (*Arteaga, supra,* 163 Cal.App.4th at pp. 344-345.) The first and third elements are of particular relevance in this case.

Plaintiff's first cause of action, broadly entitled "Violation of the California Fair Employment and Housing Act," outlined numerous claims of liability. On appeal, plaintiff contends triable issues of fact remained on four of these theories: disability discrimination, failure to accommodate a disability, failure to engage in an interactive process about accommodation, and retaliation due to disability. Two fundamental problems doom each claim: there was no evidence of physical disability and no evidence linking any such disability to an adverse employment action.

Plaintiff contends that the undisputed facts established that he suffers from sarcoidosis, a respiratory disease that qualifies as a physical disability, and that triable issues remained as to whether defendant discriminated against him because of this condition. We disagree with both assertions.

A "physical disability" for purposes of FEHA includes a physiological disease or condition that affects the respiratory system and "[l]imits a major life activity." (Gov. Code, § 12926, subd. (k)(1)(A), (B).) "Major life activities" is a term that is broadly construed and includes "physical, mental, and social activities and working." (Gov. Code, § 12926, subd. (k)(1)(B)(iii).) FEHA regulations specify breathing as a major

life activity. (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).) A major life activity is "limited" if the disease or condition "makes the achievement of the major life activity difficult." (Gov. Code, § 12926, subd. (k)(1)(B)(ii).)

As plaintiff notes, sarcoidosis, a respiratory disease, can qualify as a physical disability for purposes of FEHA. (*See County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal.App.3d 1541, 1549-1550.) However, contrary to plaintiff's assertion, there was no evidence that plaintiff suffered from this condition when the alleged adverse employment measures were taken. The undisputed facts demonstrated only that (1) plaintiff contended that he had a "disability related to his lungs," and (2) that sometime in early 2003 he told his supervisor that he was "getting winded, having problems breathing, coughing, and wheezing." After evaluating plaintiff on April 15, 2003, the examining doctor informed defendant that plaintiff had unspecified "health issues" that temporarily prevented him from wearing a standard respirator. There was no mention of sarcoidosis. Evidence that plaintiff was diagnosed with this condition after he stopped working for defendants is irrelevant to establishing that a disability existed at the time any adverse employment measures were taken.

Nor was there any suggestion that plaintiff's condition limited a major life activity by making the achievement of that activity difficult. Plaintiff's health complaints do not meet the requisite standard for establishing a physical disability. Breathing difficulties can take any number of forms, ranging

from a stuffy nose to serious lung disease, but no one would suggest that a common cold qualifies as a physical disability for purposes of FEHA. An individual who describes coughing, wheezing, being winded and having unspecified problems breathing does not describe a limitation on a major life activity. A person must provide sufficient evidence that his or her symptoms make the achievement of a major life activity difficult. (See, e g., *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030.) Without any details about how particular symptoms affect a major life activity, a plaintiff cannot establish the existence of a physical disability. (See *Arteaga, supra,* 163 Cal.App.4th at p. 348.)

The FEHA regulations recognize this distinction. After listing examples of major life activities as including functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," the regulation adds that "[p]rimary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement." (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).)

Moreover, "[a]n employer does not have to accept an employee's subjective belief that he is disabled and may rely on medical information in that respect." (*Arteaga, supra,* 163 Cal.App.4th at p. 347.) Plaintiff did not submit any medical reports until April 15, 2003, more than one month *after* he was placed on paid decision-making leave, the action plaintiff claimed constituted the adverse employment action.

This brings us to the second issue. Even if we were to assume that plaintiff suffered from a qualifying physical disability, plaintiff presented no evidence to demonstrate that he suffered an adverse employment action due to that disability. Not only does the timing of events not support plaintiff's claim, plaintiff himself stated in his deposition that he thought adverse actions were taken against him not because of disability discrimination but because he raised safety concerns. Plaintiff stated, "I felt I was being retaliated against because of bringing up safety questions, exercising to know my rights." This admission is binding. (*People ex rel. Dept. of Transportation v. Ad Way Signs, Inc., supra,* 14 Cal.App.4th at p. 200.)

The undisputed facts also demonstrate that this admission was not inadvertent. In response to defendant's statement of undisputed facts, plaintiff agreed it was undisputed that he was "placed on paid decision-making leave on March 12, 2003, and then placed on paid administrative leave *because he raised safety concerns*." (Italics added.)

The undisputed facts revealed no evidence that plaintiff was disabled for purposes of FEHA and no evidence that defendants took adverse employment action because of a disability. Summary adjudication on this cause of action was therefore proper. (*Arteaga, supra*, 163 Cal.App.4th at p. 344.)

Our conclusion that there was no evidence of a physical disability is fatal to plaintiff's remaining claims because each of these theories of liability (failure to accommodate, failure

to engage in an interactive process about accommodation, and retaliation on the basis of physical disability) is predicated on the existence of a disability. Summary adjudication of these claims in favor of defendants was therefore proper as well.

II

Judgment on the Pleadings for Alleged Labor Code Violations

The trial court entered judgment on the pleadings on plaintiff's second cause of action alleging violations of three Labor Code provisions (Lab. Code, §§ 232.5, 1102.5, 6310), because plaintiff had not exhausted his administrative remedies. On appeal, plaintiff contends that the court's ruling was erroneous and this cause of action should have gone to the jury. We disagree.

"'A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. [Citations.]' [Citation.] '"Our only task in reviewing a ruling . . . is to determine whether the complaint states a cause of action."' [Citation.] '"[W]e are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated." [Citation.]' [Citation.] We accept as true the complaint's factual allegations and give them a liberal construction. [Citation.]" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064-1065; accord *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145-146.)

In his second cause of action, plaintiff alleged that defendant disciplined, discriminated against, and retaliated against him for disclosing information about workplace conditions and reporting those conditions to OSHA, and he asserted that this conduct violated three Labor Code provisions.

Labor Code section 232.5, subdivision (c) provides in relevant part that an employer cannot "formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions."

Labor Code section 1102.5, subdivision (b) provides that "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

Finally, Labor Code section 6310, subdivision (a) provides that "[n]o person shall discharge or in any manner discriminate against any employee because the employee has . . .: [¶] (1) Made any oral or written complaint to the division [Division of Occupational Safety and Health (§ 6302, subd. (d))], other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative."

Defendants moved for judgment on the pleadings on this cause of action, asserting plaintiff had not exhausted his administrative remedies for these claims. Defendants noted that

paragraph No. 27 of plaintiff's complaint stated: "On or about April of 2003, Plaintiff submitted a formal complaint to the Department of Industrial Relations, Division of Labor Standards Enforcement. It is case number 99-08080 and is still pending." The trial court agreed that the complaint demonstrated on its face that plaintiff had not exhausted his administrative remedies and granted defendants' motion.

Plaintiff contends that the court's ruling was erroneous for a variety of reasons. He asserts that exhaustion of remedies is not required and that filing a claim with the Labor Commissioner is optional, not a procedural prerequisite to a civil suit. He notes that Labor Code section 98.7, which outlines the procedures for filing complaints before the Labor Commission, also provides that "[t]he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law." (Lab. Code, § 98.7, subd. (f).) He argues that under this provision, while an employee *may* file a complaint with the Labor Commissioner, an employee is not obligated to do so and may instead elect to pursue a remedy in court. We do not agree.

Labor Code section 98.7, subdivision (f) provides that the remedies under these provisions "do not preclude an employee from pursuing **any other** rights and remedies under **any other** law." (Boldface added.) Thus, while an employee can pursue *common law* claims without exhausting administrative remedies, an employee cannot file a complaint alleging direct *statutory*

violations without first exhausting administrative remedies. This distinction is critical.

Cases cited by plaintiff illustrate this principle. For example, in *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, the trial court had sustained defendant's demurrer to claims made under Labor Code whistleblower protection statutes because plaintiff had not exhausted his administrative remedies. Plaintiff had also asserted a claim for discharge in violation of public policy. The question was whether "an aggrieved employee must exhaust administrative remedies prior to bringing a *nonstatutory* claim." (*Id.* at p. 1704.) The court concluded that "section 98.7 administrative remedies are not exclusive and that, generally, exhaustion of theses remedies is not required before instituting a civil suit alleging certain nonstatutory claims." (*Ibid.*) Plaintiff was therefore entitled to pursue his nonstatutory tort claim for wrongful discharge in violation of public policy.

That is exactly how plaintiff's claims proceeded here. The trial court granted judgment on the pleadings on plaintiff's second cause of action seeking redress under Labor Code whistleblower protections because plaintiff had not exhausted his administrative remedies for these claims and the complaint itself demonstrated that fact. The court did, however, allow plaintiff to proceed on his third cause of action for wrongful discharge in violation of the public policies reflected in those statutes. That is precisely the distinction contemplated by Labor Code section 98.7.

The California Supreme court recently reaffirmed the exhaustion requirement: "'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation.] The rule 'is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.' [Citation.] We have emphasized that 'Exhaustion of *administrative* remedies is "a jurisdictional prerequisite to resort to the courts." [Citation.]'" (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321 (*Campbell*).)

"The rule has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal's expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case." (*Campbell, supra*, 35 Cal.4th at p. 322.)

In *Campbell*, a University of California employee attempted to sidestep university administrative procedures. The court directly addressed the question of whether claims under Labor Code section 1102.5 are subject to the exhaustion requirement. After a lengthy review of the statute's legislative history, the court concluded that a plaintiff must indeed first exhaust administrative remedies before proceeding with a civil law suit. (35 Cal.4th at pp. 329-333.)

Plaintiff contends that the principles enunciated in *Campbell* apply only in the academic setting involved in that

case and have no bearing on complaints arising in another forum. Nothing in *Campbell* suggests this reading of Labor Code section 1102.5. The legislative history of this statute does not vary depending on the type of claim or the context in which a claim arises, and *Campbell* is equally applicable regardless of the venue in which whistleblower retaliation is alleged.

Other courts, addressing claims arising in nonacademic settings, have found *Campbell* to be dispositive, holding that "a litigant seeking damages under [Labor Code] section 1102.5 is required to exhaust administrative remedies before the Labor Commissioner prior to bringing suit." (*Neveu v. City of Fresno* (E.D.Cal. 2005) 392 F.Supp.2d 1159, 1180; accord *Romaneck v. Deutsche Asset Management et al.* (N.D.Cal. 2006) 2006 U.S. Dist. LEXIS 59397, pp. 19-20; *Fenters v. Yosemite Chevron* (E.D.Cal. 2006) 2006 U.S. Dist. LEXIS 53450, p. 70.)

Applying the same rationale, the *Fenters* court also concluded that exhaustion of administrative remedies is required before filing suit for violation of another whistleblower protection claimed by plaintiff in this appeal, Labor Code section 232.5. (*Fenters v. Yosemite Chevron, supra,* 2006 U.S. Dist. LEXIS 53450, p. 71.) That conclusion is virtually compelled by *Campbell*'s reaffirmation that "'where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" (*Campbell, supra,* 35 Cal.4th at p. 321.)

The same principles lead to the same result for claims raised under the third whistleblower statute cited by plaintiff in his complaint, Labor Code section 6310. Labor Code section 6312 provides, "Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of Section 6310 . . . may file a complaint with the Labor Commissioner pursuant to Section 98.7." Plaintiff offers no reason to treat claims made under this section any differently than claims made under Labor Code sections 232.5 or 1102.5, and we see no distinction. An employee who wishes to assert a violation of this statute must first exhaust administrative remedies before filing suit.

Taking a different tack, plaintiff contends that because his claim was pending with the Department of Industrial Relations for more than one year, the administrative remedies must be deemed exhausted. Initially, we note that plaintiff's complaint does not support plaintiff's claim. The complaint, filed in March 2004, states that a claim was filed with DIR only 11 months earlier, in April 2003. The factual predicate for a one-year "deemed adopted" standard is not present.

Moreover, the case relied upon by plaintiff, *Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 650-651, involves a completely different statute and a completely different administrative scheme, namely, FEHA claims made to the Department of Fair Employment and Housing. Plaintiff offers no authority to support his assumption that a claim filed with Department of Industrial Relations must also be deemed adopted

if no action is taken within one year. While plaintiff may have had administrative or legal recourse to spur the administrative agency to act on his complaint, there is no basis for deeming his administrative remedies exhausted and we decline to invent one.

In short, plaintiff's challenges are unavailing. The trial court properly concluded that plaintiff's second cause of action, alleging violations of Labor Code sections 232.5, 1102.5, and 6310, could not be maintained because an administrative claim was still pending. Defendants were entitled to judgment on the pleadings for this cause of action due to plaintiff's failure to exhaust his administrative remedies. There was no error.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

HULL, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.